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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON GRISSO,

Defendant and Appellant.

A156639

(Alameda County
Super. Ct. No. 18-CR-00682)

Defendant Jason Grisso was sharing a house with a number of other people. Officers were dispatched to Grisso's house while he was absent to investigate a stolen car, and detained a person who tried to flee through the backyard. An officer who entered the house discovered a firearm and ammunition in a box on the floor in Grisso's room. Grisso appeals a jury verdict convicting him as a felon in possession of a firearm and felon in possession of ammunition, contending the trial court erred when it denied his motion to suppress evidence obtained due to an unlawful search and seizure. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Grisso's home was known by law enforcement officers as a place with criminal activity and stolen goods, including cars, property, and drugs. Individuals who were often on probation cycled through the house as residents, and officers often performed security checks there. An officer was

conducting such a check on April 11, 2018, when she saw a stolen car outside of the home. Additional officers were dispatched to investigate whether any of the residents had evidence related to the vehicle. Three officers approached the house from the front, and another officer was positioned in the back in anticipation that someone might flee. Before the officers reached the house or announced their presence, someone attempted to flee through the rear yard. After a brief struggle, the fleeing person was quickly detained and discovered with the key to the stolen car.

Shortly thereafter, additional officers arrived at Grisso's home. They set up a perimeter around the house and instructed any people remaining in the house to exit. At least two people came out of the house. A couple minutes later, officers entered the home to conduct a "safety sweep" to ensure no one was hiding in the house who would present any immediate threat to the officers or public safety. They systemically checked each room, the back yard, and garage without finding anyone.

A sergeant who had participated in the sweep re-entered to locate a police aide who was missing. While doing so, the sergeant walked past the open door of a bedroom and saw on the floor a "military style ammo box" that was clasped shut. He entered the bedroom, opened the box, and found the end of a gun. When Grisso returned home, he confirmed the bedroom was his. Officers engaged in a more thorough search and found several rounds of ammunition.

The People charged Grisso with one count of possession of a firearm by a felon (Pen. Code¹, § 29800, subd. (a)(1)), and one count of possession of ammunition by a felon (§ 30305, subd. (a)(1)). The information also alleged

¹ All undesignated statutory references are to the Penal Code.

Grisso had a prior felony conviction for unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)).

Before trial, Grisso moved to suppress evidence (§ 1538.5) of the firearm and ammunition, arguing that officers seized them after unlawfully entering his home and searching his bedroom without a warrant. The trial court denied the motion. In November 2018, a jury convicted Grisso of both counts. This appeal followed.

DISCUSSION

Grisso challenges the denial of his suppression motion arguing the People failed to establish the entry into his house or search of the ammunition box was lawful or within a recognized exception to the requirement for a search warrant. In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's factual findings when supported by substantial evidence but exercise our independent judgment to determine whether the search or seizure was reasonable under the Fourth Amendment. (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1212 (*Macabeo*).)

“ ‘The Fourth Amendment to the federal Constitution prohibits *unreasonable* searches and seizures.’ ” (*Macabeo, supra*, 1 Cal.5th at p. 1212; see U.S. Const., 4th Amend.) Unless it falls within a specific judicially recognized exception, a search or seizure generally requires a search warrant. (*Macabeo* at p. 1213; *People v. Williams* (1999) 20 Cal.4th 119, 125.) The People bear the burden of establishing that such an exception applies. (*Ibid.*) We will address each stage of the challenged entry and search.

I. Protective Sweep

A protective sweep is “a quick and limited search of premises” and authorizes officers to take “steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other

persons who are dangerous and who could unexpectedly launch an attack.” (*Maryland v. Buie* (1990) 494 U.S. 325, 327, 333 (*Buie*).) Protective sweeps do not require probable cause but are justified by a “*reasonable suspicion* that the area to be swept harbors a dangerous person.” (*People v. Celis* (2004) 33 Cal.4th 667, 678-679 [assuming protective sweep applied to a detention outside of the home, but finding that under the facts, officers lacked reasonable suspicion necessary to justify entry into the home] (*Celis*).) But the sweep must be based on specific and articulable facts that would warrant a reasonably prudent officer to believe that there is an armed or dangerous individual on the scene. (*Id.* at p. 677.) Reasonable suspicion is evaluated on a case-by-case basis and we examine the totality of the circumstances to determine whether there is a particularized and objective basis for the officer’s suspicion. (*People v. Werner* (2012) 207 Cal.App.4th 1195, 1206 (*Werner*).)

Grisso first argues the sergeant did not articulate any specific facts supporting a reasonable suspicion the house harbored dangerous individuals to justify his entry to perform a protective sweep. We disagree. The sergeant’s testimony here was not, as Grisso contends, a “mere inchoate and unparticularized suspicion or hunch” that the house harbored a dangerous individual. (See *Celis, supra*, 33 Cal.4th at p. 678; *Werner, supra*, 207 Cal.App.4th at p. 1209 [generalized apprehension for officer safety during domestic violence incidents did not constitute reasonable suspicion based on articulable facts to justify a protective sweep in a *specific* domestic violence arrest case].) The sergeant was familiar with Grisso’s house and some of its residents from repeated law enforcement contacts and arrests for drug possession, weapon possession, and stolen property. Upon law enforcement’s arrival at Grisso’s house to investigate a stolen vehicle, one resident fled and

injured an officer during the pursuit and detention. A few people exited the house when ordered by the officers, and the sergeant recognized one as a former gang member with continuing ties to gangs in the area. Although the people who exited the house said it was empty, one of the sergeant's police aides was missing and could not be summoned over the radio. The uncooperative nature of the fleeing resident, the sergeant's prior contacts with specific people present at Grisso's house, and the missing police aide all could lead the sergeant to reasonably suspect there could be a concealed, dangerous person inside the house, and created a concern for his officers' safety. (See *Celis*, *supra*, 33 Cal.4th at pp. 679-680.)

As Grisso acknowledges, officers may rely on prior knowledge regarding a given location when deciding whether there is a reasonable basis to conduct a protective sweep. (See *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866 ["information known to the investigating officers, filtered through the lens of their experience and training, justified the protective sweep undertaken"].) The calm manner in which the people exited the house, and their assurances that no one remained inside does not change our analysis. Neither would we conclude the protective sweep was improper because officers had already arrested the fleeing resident. While under *Buie*, a protective sweep should "[last] no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises" (*id.* at p. 326), the trial court here found that even though the arrest had been completed before the officers entered Grisso's house, significant security concerns remained. (See *Macabeo*, *supra*, 1 Cal.5th at p. 1212 [deference to trial court findings].) The sweep occurred one to two minutes after people exited the house, officers had not yet departed the premises, an aide could not be located, and their actions were sufficiently

limited in duration as required under *Buie*. Entry into Grisso's house was proper.

II. Ammunition Box Search

Grisso next contends the search of the ammunition box located in his bedroom was not authorized under any exception to the warrant requirement. Here, we agree.

A. Community Caretaking Exception

When it denied Grisso's motion to suppress, the trial court reasoned that the sergeant opened the ammunition box under the community caretaking exception articulated in *People v. Ray* (1999) 21 Cal.4th 464. The trial court recognized the sergeant's belief that children lived in the house and found the sergeant had an objectively reasonable basis to believe they may be in danger, thus he was authorized to "look for problems" including within the ammunition box. (See *id.* at pp. 471, 473 ["circumstances short of a perceived emergency may justify a warrantless entry, including the protection of property, as 'where the police reasonably believe that the premises have recently been or are being burglarized' "].)

But after the trial court denied the suppression motion, our Supreme Court in *People v. Ovieda* (2019) 7 Cal.5th 1034, expressly disapproved of the community caretaking exception in *Ray*, and concluded it improperly permitted residential entry in nonemergency circumstances. (*Id.* at pp. 1038, 1044.) We agree with Grisso, and the People do not dispute, that opening the box was not authorized under this exception.

B. Scope of Protective Sweep

We also conclude the sergeant's search of the box was beyond the scope of a protective sweep, a premise undisputed by the People. The scope of a warrantless search " 'must be "strictly circumscribed by the exigencies which

justify its initiation.” ’ ’ (*People v. Troyer* (2011) 51 Cal.4th 599, 612.) A protective sweep is “narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” (*Buie, supra*, 494 U.S. at p. 327.) Here, while the sergeant appropriately looked through the open bedroom door (see *id.* at pp. 328, 330 [entry into basement was lawful where officer saw evidence of crime, a red track suit, in plain view]), he exceeded the permissible scope of the protective sweep when he opened the box that was approximately the size of a loaf of bread. A protective sweep does not include a generalized search of a residence for weapons located in a place where a person could not be hiding, and it did not justify the sergeant’s search of the small box here. (See *id.* at p. 335 [protective sweep “is nevertheless not a full search of the premises”].)

C. Plain View

The People argue that opening the ammunition box did not constitute a “search” within the meaning of the Fourth Amendment because the box was in “plain view,” its contents were obvious, and Grisso therefore had no reasonable expectation of privacy to its contents. This is unconvincing.

Under the plain view doctrine, officers may seize an incriminating object without a warrant if they are lawfully in a position to view the object, have a lawful right to access it, and the incriminating nature of the object is “immediately apparent.” (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375; *Horton v. California* (1990) 496 U.S. 128, 134-136.) The latter element is satisfied when officers have probable cause to believe the object itself is contraband or evidence of a crime. (*People v. Gallegos* (2002) 96 Cal.App.4th 612, 623.) To be clear, the plain view doctrine addresses seizures, not searches. (*Horton*, 496 U.S. at p. 141, fn. 11 [even where a container is seized under the plain view doctrine, “its seizure does not compromise the interest

in preserving the privacy of its contents because it may only be opened pursuant to either a search warrant [citations] or one of the well-delineated exceptions to the warrant requirement”).) Instead of seizing the box in this case, the sergeant searched it by opening the top to view its contents. His actions were unauthorized under the plain view doctrine.

The People attempt to analogize this case to *People v. Green* (1981) 115 Cal.App.3d 259 (*Green*), but the two are not comparable. The *Green* Court determined an officer was not required to get a warrant to seize and open a gun case viewed in plain sight in a vehicle, yielding a loaded revolver. (*Id.* at pp. 262-263.) The decision concluded that a gun case, “by its very nature cannot support a reasonable expectation of privacy because its probable contents can be inferred from its outward appearance.” (*Id.* at p. 262.) Here, unlike the gun case in *Green*, the ammunition box label expressed its possible uses, stating it could be used for “fishing gear,” “electronics,” and “camera equipment.” Although the sergeant stated that ammunition boxes may contain a weapon or contraband, he also testified they may be used for storing personal items to protect them from fire or water damage. Consistent with that testimony, the trial court found that the ammunition box could contain non-contraband items such as jewelry, checkbooks, a passport, or anything that required safekeeping. Thus, the contents of the ammunition box could not be inferred strictly from its outward appearance, and the sergeant did not have the authority to search it without a warrant. (See *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1236 [general rule is a “warrant is required to search a lawfully seized container”].)

People v. Chavers (1983) 33 Cal.3d 462 (*Chavers*), which upheld the warrantless search of a shaving kit containing a gun during an automobile search, similarly does not help the People. (*Id.* at p. 467.) There, officers

stopped and searched a vehicle driven by two occupants who roughly matched the description of suspects in an armed robbery. (*Id.* at p. 465.) During a lawful search of the automobile and glove compartment for evidence of the suspects' identities and the gun used in the robbery, an officer opened a plastic shaving kit and found a handgun after he lifted it and "felt the outline of a gun." (*Id.* at pp. 466, 470-471; see *California v. Acevedo* (1991) 500 U.S. 565, 580 [authorizing search of an automobile and containers within it without a warrant if there is probable cause to believe the automobile contains contraband or evidence] (*Acevedo*).) The Court concluded that suppressing the gun was not warranted because the gun "was discovered in the course of the search," and "the officers had probable cause to believe that seizable items, including the fruits of the robbery and the gun used to accomplish it, were concealed somewhere in the car, including its glove compartment and the shaving bag." (*Chavers*, at pp. 473, 467.)

The circumstances here are different. Rather than lawfully searching a car pursuant to the automobile exception to the warrant requirement, here the sergeant searched Grisso's house. (*Acevedo, supra*, 500 U.S. at p. 569 [automobile exception to warrant requirement rooted in distinctions between search of an automobile and dwelling]; *U.S v. Ross* (1982) 456 U.S. 798, 824 [scope of warrantless search of automobile is defined by "the object of the search and the places in which there is probable cause to believe that [contraband] may be found," not the nature of the container in which contraband is hidden].) Moreover, at the time the sergeant saw the ammunition box, he was in the house to conduct a protective sweep, not a search based on suspected crime. (See *Chavers, supra*, 33 Cal.3d at p. 465, 471 ["Having concluded that the police officers acted lawfully in entering and searching the passenger compartment of the car and in searching the glove

compartment,” opening the shaving kit was reasonable and constitutional].) *Chavers* does not support the reasonableness of the sergeant’s opening the container in Grisso’s room.

D. Probation Search

The People next argue the search was justified because the sergeant reasonably believed the resident of the room was a third-party subject to a probation search condition, not Grisso. More specifically, the People assert the sergeant appropriately searched the ammunition box because he identified five individuals that had lived in Grisso’s house and were subject to probation search conditions at various unspecified times in the nine months preceding April 11, 2018. We disagree.

Warrantless searches are authorized when an individual is subject to a residential search and seizure condition of probation. (*People v. Robles* (2000) 23 Cal.4th 789, 795.) The terms of probation define the scope of any allowable search, thus an officer must have “ ‘advance knowledge of the search condition’ before conducting a search.” (*People v. Romeo* (2015) 240 Cal.App.4th 931, 939-940 (*Romeo*).) A search is reasonably related to a probationary purpose if the facts known to the searching officer provide “objectively reasonable grounds to believe” that a probationer lives in the residence. (*People v. Downey* (2011) 198 Cal.App.4th 652, 661 (*Downey*), italics omitted.) Establishing the probation search exception required the People to present evidence “of a search clause expressly allowing a residential search” or detailed testimony from the searching officer “showing some understanding of the operative terms of probation and connecting those terms to the need for a warrantless search.” (*Romeo, supra*, at p. 955.)

On this record, the People failed to meet their burden that the sergeant conducted a valid probation search. Initially, the sergeant admitted he

opened the ammunition box solely because he was worried there were young kids in the house, not because he was performing a probation search. More importantly, *before* he opened the ammunition box, the sergeant was unaware of any specific resident's probation status or search conditions. The timing of these events is critical. The sergeant ordered officers to identify each residents' probation status, search conditions, and the room where each resident lived before engaging in any search. But there was no testimony, and the People do not identify anything in the record, to show that the sergeant received any of this information before the protective search or when he opened ammunition box. Instead, the sergeant admitted that when he entered Grisso's bedroom to look at the box, he did not know who was staying in the room at the time. The evidence was insufficient to justify a probation search. (See *Romeo, supra*, 240 Cal.App.4th at pp. 939-940 ["Without such advance knowledge, the search cannot be justified as a proper probation search, for the officer does not act pursuant to the search condition"].)

The People nonetheless challenge this conclusion by arguing the sergeant reasonably believed another person, Frank Garcia, resided in Grisso's room and was subject to a residential probation search condition. (See *People v. Douglas* (2015) 240 Cal.App.4th 855, 870; see also *Downey, supra*, 198 Cal.App.4th at pp. 661-662.) Not so. Although the sergeant may have known of Garcia's probation search conditions before engaging in the search, the testimony about *when* he confirmed this information was unclear. It cannot be determined from the record whether he knew so two weeks before April 11, 2018, or some unidentified point in the nine months preceding that time. As the sergeant properly acknowledged, probation search conditions are not indefinite, and expire when probation ends. A

person may no longer be subject to a search clause that was in effect weeks or months before the search.

The basis for the sergeant's belief that Garcia actually resided in Grisso's room was also inadequate. (See *Downey, supra*, 198 Cal.App.4th at pp. 661-662.) While officers may search a probationer's residence pursuant to a search clause, they may not indiscriminately search all portions of the residence. (*People v. Woods* (1999) 21 Cal.4th 668, 676, 682 [noting warrantless consent searches of residences have been upheld even where purpose of search is to obtain evidence of nonconsenting cohabitant].) Rather, the search must be limited to the terms of the search clause and portions of the residence "over which the probationer is believed to exercise complete or joint authority." (*Id.* at p. 681.)

Garcia's probation report listed a different residential address than the one searched. The sergeant was aware of the address discrepancy and also testified that someone other than Garcia was living in Grisso's room as recently as April 2018. The People did not present any evidence of attempts to verify Garcia's residence or room, such as with utility bills bearing Garcia's name or questioning him, before engaging in the search. (See *Downey, supra*, at p. 655 [because probationers sometimes give false addresses, officer researched various databases to determine where specific probationer lived].) Instead, the People ask us to simply accept the sergeant's declaration that Garcia lived in Grisso's house and room, despite other testimony that undermined that conclusion. We do not, and it was not reasonable for the sergeant to assume Garcia lived at the residence or in Grisso's room.

The search of the box violated the Fourth Amendment, and the trial court improperly denied Grisso's motion to suppress. In light of this determination, we do not address Grisso's remaining arguments that the

firearm and ammunition were unlawfully seized. The People concede that without the discovery of the gun and ammunition, it was unlikely they could prove Grisso's charges of felon in possession of these items at trial.

DISPOSITION

The judgment is reversed.

Siggins, P.J.

WE CONCUR:

Petrou, J.

Jackson, J.

People v. Grisso, A156639